

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

A.S. No.1598 of 1999

JUDGMENT:

The unsuccessful first defendant (since died) preferred this appeal suit assailing the decree and judgment, dated 20.12.1994, of the learned Additional Senior Civil Judge, Srikakulam, passed in O.S.No.98 of 1991. Appellants 2 and 3, who are his legal representatives, are prosecuting this appeal.

2. I have heard the submissions of Sri M. Balasubrahmanyam, learned counsel for the appellants 2 and 3, and of Sri D. Ramalinga Swamy, learned counsel for the respondents 1 to 3/plaintiffs. I have perused material record.

3. The parties in this appeal suit shall hereinafter be referred to as 'the plaintiffs' and 'the first defendant' as arrayed in the original suit for convenience and security.

4. Since this is a first appeal suit and as this Court is the last Court of fact, it is necessary to refer to the pleadings of the parties.

5. The plaint averments, in brief, are as follows:

The plaintiffs are the sisters. The first defendant is their brother. They are the children of Jami Venkatappanna, S/o. late Appanna of Peddapeta Village, Narasannapeta Town. The said Jami Venkatappanna died in January, 1971. As on the date of his death, he was having undivided half interest in the co-parcenary property, which is more fully

described in the plaint 'A', 'B', 'C', 'D' and 'E' schedule properties. He was also having about 100 tolas of gold, 6 Kgs of silver and about Rs.1,00,000/- cash at the time of his death. He had two wives. The first plaintiff and the first defendant are the children of his first wife, Annapurnamma. After the demise of his first wife, Venkatappanna married Seethamma. The plaintiffs 2 and 3 are the daughters of his second wife, Seethamma. His second wife also predeceased him. The plaintiffs 1 to 3 and the first defendant succeeded to the undivided half interest of Venkatappanna in the plaint 'A' to 'E' schedule properties, which are co-parcenary properties. As per the provisions of the Hindu Succession Act, 1956, (for short, 'the Act'), the plaintiffs 1 to 3 and the first defendant, being class-I legal heirs of the deceased Venkatappanna, are having equal shares in the said properties. The plaintiffs are entitled to $1/8^{\text{th}}$ share each in the schedule properties. The first defendant is entitled to $1/2 + 1/8^{\text{th}}$ share i.e., $5/8^{\text{th}}$ share in the schedule properties. The plaintiffs are in joint and constructive possession of the plaint schedule properties along with the first defendant. They wanted to convert joint possession into separate possession, as they are unwilling to remain joint with the first defendant. Hence, in the month of August, 1991, the plaintiffs demanded the first defendant to give their share of properties. The first defendant agreed to give their shares in the properties, but, was procrastinating. Venkatappanna had three brothers, namely, (1) Rajanna, (2) Narasimhulu and (3) Gurumurthy. The items 1 and 2 of plaint 'A' schedule property are the ancestral properties of Venkatappanna. He purchased $1/4^{\text{th}}$ undivided interest of Rajanna in

the plaint 'A' schedule property. So, he became entitled to undivided half of the total extent of items 1 and 2 of the plaint 'A' schedule land. The remaining undivided half belongs to defendants 2 to 5. Defendants 2 to 4 are the son, widow and daughter of Jami Gurumurthy, the brother of Venkatappa. So, they are entitled to 1/4th share in Survey Nos.114/2 and 105/2 of Byri Village. The fifth defendant purchased the undivided 1/4th share in Survey Nos.114/2 and 105/2 of Byri Village, of Jami Kusuma Haranath, the adopted son of Jami Narasimhulu. So, he is entitled to undivided 1/4th interest in the lands covered by the said survey numbers. Therefore, defendants 2 to 5 were added as parties, being necessary parties to the suit. The first defendant sold away the plaint 'C' schedule land to the sixth defendant about three years ago. The sale of plaint 'C' schedule land by the first defendant to the sixth defendant does not bind the plaintiffs insofar as their 3/8th share in the plaint 'C' schedule land. Hence, the sixth defendant, being necessary party, was added as a party to the suit. The suit is, hence, filed for partition of plaint 'A' to 'E' schedule properties into eight equal shares and to put the plaintiffs 1 to 3 in separate possession of one such share each and for mesne profits from the date of the suit till the date of delivery of possession and for costs.

6. Defendants 2 to 4 and 6 remained *ex parte*.

7. The averments in the written statement of the first defendant, in brief, are as follows: "The relationship between the parties as mentioned in the plaint is true. The other material allegations in the plaint are false. The allegations that Jami Venkatappa had undivided half interest in

the plaint 'A' to 'E' schedule properties; that he was having 100 tolas of gold, 6 Kgs of silver and Rs.1,00,000/- cash at the time of his death; that the plaintiffs 1 to 3 and the first defendant simultaneously succeeded to the said interest of Venkatappanna in the plaint 'A' to 'E' schedule properties under the provisions of the Act; that the plaintiffs are in joint and constructive possession of the suit schedule properties along with the first defendant; that the plaintiffs, having decided to convert joint possession into separate possession, made a request to the first defendant in August, 1991, to give their shares, but the first defendant procrastinated the matter; that Venkatappanna purchased undivided 1/4th share of his brother, Rajanna, in the plaint 'A' schedule property and, therefore, he is entitled to a larger share, as stated in the plaint; that the sale of plaint 'C' schedule property by the first defendant in favour of the sixth defendant is not binding on the plaintiffs and that the plaintiffs are entitled to seek partition of the plaint 'A' to 'E' schedule properties; are false allegations. The plaintiffs were never in joint possession of the suit schedule properties along with the first defendant and they never enjoyed the usufruct of the suit schedule properties. The suit is barred by limitation as Venkatappanna died in January, 1971 and the present suit is filed in the year 1991 i.e., about more than 20 years after the death of the said Venkatappanna. The allegations of the plaintiffs that they made a demand for partition in 1991, having kept quiet for 20 years, is *ex facie* false. After the death of Venkatappanna, in the presence of mediators, Vysyaraju Venkataraju, Vysyaraju Suryanarayana Raju, Votti Appalasuryanarayana and Jami Gurumurthy,

the plaintiffs have taken their share, i.e., five tolas of gold ornaments each and cash of Rs.5,000/- each in full settlement of their claims in the immovable and movable properties of Venkatappanna. Hence, they cannot again claim shares in the properties of late Venkatappanna; and they are estopped from claiming partition of the properties of Venkatappanna. The plaintiffs are not entitled to claim partition of 'D' schedule property, as it is the residential house of the first defendant, wherein the first defendant, his wife, adopted son, daughter & her husband and their children were living. The said house is not liable for partition. As per the provision of Section 23 of the Act, if there is partition or separation of properties among male heirs only, the daughters will be entitled to claim a share in the residential house, otherwise they are not entitled to claim a share in the residential house. The house property was not worth more than Rs.30,000/-. It was partly terraced and partly tiled. The plaintiffs are antagonistic towards the first defendant, as he has adopted a son, after the death of his natural son, and as they were expecting that he will give some of his properties to them. The first defendant had adopted his daughter's son, by name, Santhosh Kumar, on 23.05.1987, according to Hindu Law, rituals and caste customs; and, subsequently, a registered adoption deed, dated 27.08.1991, was also got written. From then onwards, the plaintiffs bore grudge against the first defendant; and, the suit was filed to wreck vengeance. Further, prior to the filing of the suit, no notice was given by them; and, the suit was filed with malicious intention. The first defendant had five grand daughters, who are the daughters of

Jayalakshmi. He performed their marriages by spending Rs.60,000/- for each marriage. He contracted many debts to meet the marriage expenses. He became blind and sick. His wife also became sick and is suffering from blindness. He spent huge money on medical expenses and family necessities. He had to borrow amounts; and, still, he is indebted to certain persons in the village. As there was no-body to look after him and his wife, the first defendant adopted his daughter's son, Santhosh Kumar, when he was a small boy. The first defendant brought Swarnalatha and her husband, Appayya Chetty, who are the natural parents of Santhosh Kumar, along with their children to his house to look after and manage his properties. Most of the properties found in the house of the first defendant belong to Appayya Chetty. The plaintiffs bore grudge against Appayya Chetty, as he had given his son in adoption to the first defendant and was managing the affairs of the first defendant by residing in his house. Plaintiff 'A' schedule lands are in possession of the tenant, fifth defendant – Balaga Neelayya and he was paying makta. Plaintiff 'B' schedule properties are being cultivated by Karda Appayya, the tenant, by paying makta. The extent of land is Ac.1.03 cents and not Ac.1.23 cents. The first defendant sold Ac.1.08 cents of land i.e., plaintiff 'C' schedule land to the sixth defendant to meet his medical expenses and family necessities. The properties shown in plaintiff 'E' schedule are exaggerated by putting their values highly. The first defendant was not having 35 tolas of gold valued at Rs.1,40,000/-. His wife was having five tolas of gold only and the value of the gold was not more than Rs.2,000/- per tola. In the inventory made by the

Commissioner, the gold belonging to Swarnalatha, wife of Apppayya Chetti, was found and Swarnalatha made a claim before the Commissioner for declaration of the same. The first defendant also filed objections to the Commissioner's Inventory Report. He was not having 6 Kgs of silver ornaments valued at Rs.7,000/- per kg. The said rate mentioned was very high. He was having only 200 tolas of silver. Hence, the plaintiffs cannot claim any share in it. In the inventory made by the Commissioner, the silver ornaments belonging to Swarnalatha were also made a mention of and Swarna Latha made a claim for the same before the Commissioner. This defendant's father, Venkatappa, was not having any gold or silver articles by the date of his death. The first defendant was not having cash of Rs.10,000/-, as shown in the plaint 'C' schedule and there was no cash belonging to Venkatappa. This defendant was not having Fixed Deposits in Post Office valued at Rs.10,000/-. Voona China Sambamurthy was not at all indebted to this defendant. He was a multimillionaire and an income tax assessee. He had no need to borrow any amount from anybody, much less, this defendant. Furthermore, the first defendant was not in a position to give loans to anybody. Letters and pronotes will be prepared for income tax purposes and to get deduction from the income and to lessen the tax burden. The first defendant has not lent any amount on pledge of gold articles. He has also filed his objections to the Commissioner's Inventory Report. The Commissioner has not properly noted the objections of the parties raised at the time of his inventory. The Commissioner has not taken the signatures of the first defendant on the list prepared by him.

The list prepared by him was not valid and correct. Item No.19 in the Inventory List belongs to Appayya Chetty. The properties mentioned therein were not existing, as the debt was discharged by Borubhadra Mallemma to Appayya Chetty and articles were taken away and only the slip was left. Item No.20 in the Inventory List was only a paper transaction evidencing the debt. The properties were not available. Appayya Chetty was looking after the affairs of the first defendant, as the defendant was blind. Appayya Chetty was living in the house along with his wife for a considerable part of time, every year. The items covered by Item Nos.20 and 21 in the Inventory List belong to Appayya Chetty. The said transactions were not subsisting; the amount was discharged long time ago. Item No. 30 covered by the Inventory List relates to a discharged transaction. The said discharge was about four years ago. The 10 sovereigns mentioned in the list were not available by the time of visit of the Commissioner. Item No.37 of the Inventory List belongs to Swarna Latha, the wife of Appayya Chetty, and it was her 'stridhana' property. Item No.38 of the Inventory List belongs to Kanthamma, the wife of the first defendant, and it was her 'stridhana' property. Item No.39 of the Inventory List does not belong to the first defendant; the transaction belongs to Swarna Latha. The properties were not existing but only chits were available. The sub-item numbers relating to the transaction under Item No.41 of Inventory List are paper transactions and the same was not supported by any consideration. Item No.42 of the Inventory List belongs to a transaction of Swarna Latha and not to this defendant. Item No.44 does not belong to the first

defendant; but, it belongs to Appayya Chetty. The first three items in Item No.45 covered by the Inventory List relate to the debts borrowed by the first defendant and item Nos.4 to 6 in Item No.45 belong to Swarna Latha. Sub-item No.7 and sub-item Nos.17(a), (b) and (c) of Item No.49 of the Inventory List weighing about 4 2/3rd kilograms belong to Appayya Chetty. The total weight of the gold of items 1 to 17 of Item No.49 of the Inventory List was not 8.1 kgs; but, 6 Kgs., only. The plaintiffs are neither entitled to any share in the plaint schedule properties nor any profits. The Court fee paid is not correct. The suit is barred by law of limitation. The first defendant has perfected title to the suit properties by adverse possession. The suit may be dismissed with costs.'

8. The first defendant filed additional written statement at the stage of arguments alleging that he perfected title to the suit schedule immovable properties by ouster to the knowledge of the plaintiffs.

9. The averments in the written statement of the fifth defendant, in brief, are as follows:

'He was cultivating land of an extent of Ac.2.85 cents out of plaint 'A' schedule under the first defendant on ambaram of one grace and 12 putties of paddy and one putty and twelve kunchams of green gram per year. The plaintiffs have no concern with the same. He is not a necessary party to the suit. Hence, the suit may be dismissed against him.'

10. Taking into consideration the above pleadings, the trial Court framed the following issues:

- “1. Whether there was partition after death of late Venkatappaanna as alleged in the written statement of D.1?
2. Whether the plaintiff is not entitled to claim partition of plaint D- schedule residential house?
3. Whether the extent of plaint B schedule land is Ac.1.03 cents but not Ac.1.23 cents?
4. Whether D.1 sold Ac.1.03 cents of C schedule property to D.6 for family necessities?
5. Whether the 1st defendant is not having 35 tolas of gold, six K.Gs of silver and cash of Rs.10,000/- FDR as shown in E schedule?
6. Whether D.1 had no money as shown in E schedule?
7. Whether D.5 is not a necessary party to the suit?
8. Whether the plaintiff is not entitled to seek partition of plaint A to E schedule properties into eight equal shares and for possession of one such share to each of plaintiffs 1 to 3?
9. To what relief?”

10.1. The trial Court also framed an additional issue on the first defendant filing his additional written statement. It reads as under:

“Whether the defendant No.1 perfected the title to the suit schedule properties of lands and buildings by ouster to the knowledge of the plaintiffs.”

11. Before the trial Court, the second plaintiff was examined as P.W.1. No documents were marked on the side of the plaintiffs. On behalf of the defendants, the first defendant was examined as D.W.1 and his supporting witnesses, V. China Sambamurthy, Vysyaraju Sanyasi Raju and K. Vykunta Rao were examined as D.Ws.2 to 4. G. Neelayya, a tenant of the first defendant with regard to plaint ‘A’ schedule land, was

examined as D.W.5. T.Nageswararao, who was examined as D.W.6, deposed that he has lent an amount of Rs.15,000/- to the first defendant. T. Venkatarao, who was examined as D.W.7, deposed that he has constructed the terraced house i.e., plaint 'D' schedule house. K. Appanna, who was examined as D.W.8, was the tenant of the first defendant in respect of plaint 'B' schedule land. D.W.9, Appayya Chetty is the natural father of the adopted son of the first defendant. V. Parvateesam, who was examined as D.W.10, deposed about the cost of the construction of the terraced portion of plaint 'D' schedule house. No documents are exhibited in exhibit 'B' series. Exs.X.1 and X.2 were only marked. Ex.X.1 is the receipt for Rs.15,000/- issued by Jami Byragi in favour of D.W.6. Ex.X.2 is the registered adoption deed executed by Jami Byragi and his wife in favour of Appayya Chetty and his wife.

12. On merits and by the judgment impugned in this appeal suit, the trial Court partly decreed the suit of the plaintiffs. The trial Court while dismissing the suit in respect of $1/8^{\text{th}}$ share in the terraced portion of plaint 'D' schedule house and plaint 'E' schedule movables, held that the mesne profits would be decided on a separate petition.

13. The operative portion of the judgment of the trial Court reads verbatim as under:

“In the result the plaintiffs are entitled to get $1/8^{\text{th}}$ share each in $1/4^{\text{th}}$ undivided share in the plaint A schedule property. $1/8^{\text{th}}$ share each in plaint B and C schedule properties and $1/8^{\text{th}}$ share in plaint D schedule tiled portion and $1/8^{\text{th}}$ share in the value of the site on which D.1 has

constructed the terraced portion and mesne profits in the said property from the date of filing of the suit till the date of delivery of possession of the same. The plaintiffs claim in respect of 1/8th share in terraced portion of plaint D schedule house and plaint E schedule movables is disallowed. Accordingly the suit is decreed partly. Mesne profits will be decided on separate petition. In the circumstances both the parties do bear their own costs.”

14. As noted above, aggrieved thereby, the first defendant preferred this appeal and on his death, the appellants 2 and 3 i.e., his wife and adopted son were brought on record.

15. At the hearing, learned counsel for the appellants contended as follows:

“The trial Court ought to have seen that after the death of Jami Venkatappanna, who is the father of the plaintiffs & the first defendant, the plaintiffs have taken their share i.e., five tolas of gold ornaments each and cash of Rs.5,000/- each in full settlement of their claim in the immovable and movable properties of late Venkatappanna; and, hence, they are estopped from seeking partition once again and the suit for partition is not maintainable. The learned Judge of the trial Court ought to have seen that after the death of Venkatappanna, the first defendant (since died) was in exclusive possession of the plaint schedule immovable properties. The plaintiffs have not questioned the exclusive possession of the first defendant since they have received their shares in the properties of their father in the form of gold and cash. For that reason, the first defendant acquired title in the plaint schedule property

by ouster and adverse possession. The trial Court ought to have seen that the evidence on record clearly establishes the exclusion of the plaintiffs from possession and enjoyment of the plaint schedule properties and the exclusive enjoyment of the same by the first defendant till the filing of the suit, which was belatedly filed in the year 1991, i.e., 20 years after the death of Venkatappa. The trial Court ought to have seen that the conduct of the plaintiffs in not demanding partition till 1991 and their further conduct in filing the suit 20 years after the death of their father, probablises the defence of the first defendant that the plaintiffs have taken their respective shares in the form of gold and cash in lieu of their shares in the properties of Venkatappa and that, thereafter, the first defendant alone exclusively enjoyed the property and perfected title by adverse possession. Therefore, the learned trial Judge ought to have held that the plaintiffs are not entitled to seek partition of the plaint schedule properties and ought not to have partly decreed the suit. The learned Judge failed to see that the first defendant sold 'C' schedule property to the sixth defendant for family necessities. The appreciation of the evidence by the trial Court is wrong. The judgment of the trial Court is vitiated, as the trial Court proceeded on incorrect appreciation of the evidence.'

16. *Per contra*, learned counsel appearing for the plaintiffs, while supporting the judgment and decree of the trial Court, contended that the first defendant failed to establish his defence that the plaintiffs have received cash and gold in lieu of their shares and also his further defence of exclusive possession and enjoyment of the properties and the plea of

ouster and adverse possession as rightly held by the trial Court and therefore, the appeal suit is devoid of merit and is liable to be dismissed. He further submitted that the trial Court elaborately discussed the oral evidence before arriving at just decision on all the issues and that the well reasoned judgment of the trial Court does not brook interference.

17. I have carefully gone through the pleadings and the evidence placed on record.

18. The suit is partly decreed. The operative portion of the judgment of the trial Court is already extracted at paragraph 13 supra. From the said judgment, it is clear that the suit insofar as the claim in respect of 1/8th share in terraced portion of plaint 'D' schedule house and plaint 'E' schedule movable properties is disallowed and the suit is dismissed in that regard. However, the plaintiffs, who are unsuccessful in that regard, had not assailed that part of the decree of the trial Court which is against them. The subject matter of the present appeal suit, therefore, is confined to plaint 'A', 'B' & 'C' schedule properties and 1/8th share in plaint 'D' schedule tiled house portion and 1/8th share of the value of the site on which the 1st defendant has constructed the terraced portion and the entitlement of the plaintiffs to mesne profits from the date of the filing of the suit till date of delivery of possession of the above said properties in respect of which a preliminary decree for partition was granted by the trial Court.

19. Since the 1st defendant contended that there was already a partition after the death of late Venkatappanna and further pleaded that

he perfected title by adverse possession in respect of the subject properties and had also taken a plea of ouster and *inter alia* contended that plaintiffs have taken five tolas of gold ornaments and Rs.5,000/- cash each in full settlement of claims in the properties of Venkatappa and, therefore, they are not entitled to again seek partition of the subject properties, the following points arise for determination in this first appeal suit.

1. Whether there was a partition of the properties after death of late Venktappa?
2. Whether the plaintiffs received five tolas of gold each and Rs.5,000/- each in cash? And, if so, whether they are not entitled to seek partition?
3. Whether the first defendant perfected title by adverse possession and by means of ouster as further pleaded in the additional written statement?
4. Whether the decree and judgment of the trial Court are unsustainable under facts and in law?
5. To what relief?

20.1 POINT Nos.1,2 & 3:

The relationship between the parties is not in dispute. Jami Venkatappa is the father of plaintiffs 1 to 3 and the 1st defendant. He had two wives. First plaintiff and first defendant are the children of his first wife, Annapurna. After her death, he married another lady and gave birth to second and third plaintiffs through his second wife. The second wife also predeceased Venkatappa. He died intestate in or about 1971 leaving behind him his above said legal heirs and also the plaint schedule immovable properties except the

terraced house portion of plaint 'D' schedule that was admittedly constructed by the 1st defendant after removing the dilapidated tiled house portion thereon. It is the defence of the 1st defendant that after the death of late Venkatappa, the plaintiffs, in the presence of mediators, were given five tolas of gold each and cash of Rs.5,000/- each in full settlement of their shares in the properties left behind by late Venkatappa and that, therefore, there was already a partition; and that thereafter the 1st defendant was exclusively enjoying the properties of Venkatappa; and that the plaintiffs never objected for the same; and that they also never received their shares of usufruct from the immovable properties and that thereby he perfected title by adverse possession and also by ouster by being in exclusive possession and enjoyment of the subject schedule properties to the knowledge of the plaintiffs. However the plaintiffs denied receiving of cash and gold after the death of their father towards their shares. As already noted, the evidence brought on record discloses that Venkatappa died in or about 1971. DW1 in his evidence stated that 12 days after the death of his father, the said quantities of gold and sums of money were given to the plaintiffs before the elders namely Vysaraju Suryanarayanaraju, Jami Gurumurthy, Vaddi Appalasuryanarayana and Vysaraju Venkataraju; but, the plaintiffs contend that the names of the alleged elders, who are dead, were pressed into service to support the false plea of the 1st defendant and to conveniently get over the requirement of examination of the alleged elders allegedly present at the time of the alleged settlement. However, on this aspect of settlement or partition before the elders,

except the self serving statement of DW1, there is no other evidence much less evidence of reliable character. As rightly pointed out by the learned counsel for the plaintiffs, contrary to what has been deposed by DW1, it was suggested in cross examination to PW1, the 2nd plaintiff, that the cash and gold were given to each of the plaintiffs after the death of their mother and that the gold of their mother was distributed amongst the plaintiffs by their father and that the father has also given cash of Rs.5,000/- to each of the plaintiff. The suggestion which is inconsistent with the defence and the evidence of DW1 belies the theory of prior partition and settlement before the elders. Any other witness of advanced age, who knows about the alleged prior partition or settlement, if any, after the death of Venkatappanna, was not even examined to prove the said alleged prior partition or settlement with the daughters of Venkatappanna. Therefore, there is no evidence much less evidence of reliable character to show that there was a settlement or partition after the death of Venkatappanna and that *in lieu* of their shares, each of the plaintiffs was given five tolas of gold and cash of Rs.5,000/- each towards their respective shares in the subject suit schedule properties.

20.2 Be it also noted that one of the defences raised by the appellant-1st defendant is that unless the male members partition the properties, the female heirs/female sharers are not entitled to seek partition of a dwelling house in the occupation of a male heir. The very defence that, unless the male members partition the property, the female members of the family cannot seek partition probablises the case of the plaintiffs that there is no prior partition and that they were not given either cash or

gold *in lieu* of their shares in the immovable properties and that the property continued to be in joint possession as there was no partition.

20.3 On the above analysis, this Court finds itself in agreement with the finding of the trial Court that there is no reliable evidence to believe that there was prior partition of the properties after the death of late Venkatappa and that the plaintiffs were given five tolas of gold and cash of Rs.5,000/- each in full settlement of their shares in the properties left behind by late Venkatappa. Points 1 & 2 are accordingly answered against appellants.

20.4 Dealing now with point no.3, it is to be noted that this Court already recorded a finding that there was no prior partition or settlement before elders as alleged by the 1st defendant and that the plaintiffs were not given any gold and cash *in lieu* of their shares in the immovable properties. In view of that finding, the contention of the 1st defendant, who is the brother of the plaintiffs, that he is in exclusive possession of the properties of Venkatappa, which devolved upon the plaintiffs as well as the 1st defendant by means of succession, needs no countenance, *ex facie*. However, learned counsel for the 1st defendant-appellant would contend that after the death of Venkatappa in or about the year 1971, all the plaintiffs had kept quiet for more than 20 years and that, therefore, the 1st defendant, who enjoyed the properties exclusively, perfected title by adverse possession and also by reason of ouster and that the properties were never in joint possession of the plaintiffs & the 1st defendant and that the plaintiffs were never given a share of the

usufruct from the immovable properties and, therefore, the trial Court was in error in partly decreeing the suit for partition in favour of the plaintiffs.

20.5 On the present issue, the legal burden as well as the onus of proof is on the 1st defendant. No-doubt, the suit was filed by the plaintiffs long after the death of the father, Venkatappanna. Nevertheless it was averred in the plaint that in the month of August, 1991, they demanded the 1st defendant to give their respective shares and that the 1st defendant agreed to do so, but, postponed the issue on one pretext or the other; and, hence, they were constrained to file the suit for partition of the plaint schedule properties, which are in joint possession, and for allotment of their respective shares. The sole witness for the plaintiffs is PW1, the 2nd plaintiff. She asserted the pleaded case of the plaintiffs. In her evidence, she did not state any reasons for keeping quiet for more than 20 years without instituting a suit for partition inspite of refusal of the 1st defendant to co-operate for partition despite their requests being made since the date of the death of their father. Admittedly, no notice is also given by the plaintiffs prior to the institution of the suit for partition. However, she stated that they are hopeful that their brother would give the shares and as such, they did not raise a dispute before the elders. She also stated that the 1st defendant has been enjoying the plaint schedule property even after the death of their father exclusively for the last more than 23 years as on the date of her deposition. Therefore, placing reliance on the said evidence of PW1, learned counsel for the appellants forcefully contended as follows: 'PW1 admitted that the 1st

defendant refused to partition the plaint schedule properties when the plaintiffs made a request after the death of their father. She also stated that the 1st defendant has been enjoying the properties exclusively. The plaintiffs had knowledge of such exclusive possession of the 1st defendant since the date of death of Venkatappa and yet failed to bring a suit for partition, within the period allowed under law. Therefore, the trial Court ought to have held that the plaintiffs were ousted and that the 1st defendant perfected title by adverse possession.’ Per contra, learned counsel for the plaintiffs argued that the plaintiffs are co-heirs of 1st defendant and that mere exclusive possession of one co-heir will not confer exclusive rights on the co-heir in possession of the joint properties and that the co-heir remains in possession and holds the properties for the benefit of all the co-heirs and that the possession of one co-heir or co-sharer is the possession of all the co-sharers. Be it noted that in the written statement initially filed, the 1st defendant having only pleaded that the plaintiffs are not entitled to again seek partition of the plaint schedule properties as they were given five tolas of gold and cash of Rs.5,000/- each in lieu of their shares in the immovable properties as per the settlement before mediators. He, *inter alia*, urged in the said written statement that the suit is barred by limitation and that the 1st defendant has perfected title to the suit properties by adverse possession. Except making the said two bald statements on the aspects of bar of limitation and adverse possession, he did not specifically assert hostile title coupled with exclusive possession and enjoyment of the plaint schedule properties to the knowledge of the plaintiffs. It is borne

out by record that after the arguments in the suit were heard and a contention was raised on behalf of the plaintiffs that a co-heir or a co-sharer cannot plead adverse possession except by taking a plea of ouster, the 1st defendant has come forward with an additional pleading by means of an additional written statement and alleged therein that by means of ouster to the knowledge of the plaintiffs, he perfected title by adverse possession. This plea of ouster was belatedly raised; and, after such additional written statement was filed, no evidence was adduced.

20.6 Before proceeding further with the further discussion on this point, it is apposite to refer to the legal position obtaining.

The ordinary classical requirement of adverse possession is that it should be nec vi; nec clam; nec precario. [See **Secretary of State for India v. Debendra Lal Khan**::(1933) L.R. 61 I.S. 78]. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [See: **Radhamoni Debi v. Collector of Khulna**::(1900) L.R. 2 Ind.Ap 136].

“Adverse possession” means hostile possession, that is, a possession which is expressly in denial of the title of the true owner. (See: **Gaya Parshad Dikshit v. Nirmal Chander and Anr.** :: [1984]2SCR287) .

In **Ezaz Ali v. Special Manager, Court of Wards** [AIR 1935 PC 53] it was observed as under: “The principle of law is firmly established that a person, who bases his title on adverse possession, must show by

clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.”

It is also well-settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession, who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title. It is a settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster. [See: **P. Lakshmi Reddy vs. L. Lakshmi Reddy**:: (AIR1957SC314)].

In **Karbalai Begum v. Mohd. Sayeed and Anr.**:: [1981]1SCR863, the law has been stated by the Supreme Court in the following terms:

"....It is well settled that mere non-participation in the rent and profits of the land of a co-sharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession..."

In Darshan Singh and Ors. v. Gujjar Singh (Dead) by LR.

and Ors.:: [2002]1SCR91 , it is stated :

“...It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers.”

“In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.”

Further, long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land does not amount to ouster so as to give title by prescription. A co-sharer in possession, as is well settled, becomes a constructive trustee of other co-sharer, who is not in possession of the properties, and the right of the said co-sharer not in possession would thus be deemed to be protected by the trustee. However, 'ouster' does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other

co-owner. [See: **Md. Mohammad Ali (Dead) by Lrs. vs. Sri Jagadish Kalita and Ors.::** (2004)1SCC271]

20.7 Reverting to the facts of the instant case, in the instant case as no partition by metes and bounds took place, the 1st defendant/appellant herein was bound to plead and prove ouster of the plaintiffs from the properties in question. The plea of adverse possession set up by the appellant/1st defendant, as reproduced herein before, does not meet the requirements of law. Having filed additional written statement and taken the plea of ouster, the 1st defendant failed to establish the said additional plea by adducing any or necessary evidence. Therefore, in the present case the 1st defendant/appellant failed to prove the ouster along with other three circumstances, namely, hostile intention; long and uninterrupted possession; and exercise of the right of exclusive ownership openly and to the knowledge of the owner. Therefore, the evidence brought on record, on careful scrutiny, does not disclose that the 1st defendant openly denied the right, title and interest of the plaintiffs in the joint properties. As such, the plea of adverse possession coupled with ouster is not established by adducing any evidence much less the evidence of required standard. The 1st defendant only pleaded a prior partition and giving of some gold and cash to each of the plaintiffs *in lieu* of their shares in the plaint schedule properties but did not plead about his exclusive possession is to the denial of the right, title and interests of the plaintiffs in the joint properties. Therefore, there is no pleading or evidence to come to a safe conclusion that the 1st defendant denied the title of the plaintiffs in the plaint schedule properties. The

law is well settled that in a suit for partition, when one of the sharers takes a plea of adverse possession coupled with ouster, the burden, which is heavy, lies upon such sharer and the said plea must contain all the necessary details and shall be established by cogent and convincing evidence. There was neither sufficient pleading as required under facts and in law nor evidence in support of the defence that 1st defendant perfected title by means of adverse possession coupled with ouster. When once the prior partition plea of the 1st defendant is disbelieved, the weak defence of adverse possession coupled with ouster would be of no avail to the 1st defendant. However, as rightly pointed out by the learned counsel for the plaintiffs the 1st defendant sold exclusively 'C' schedule property but the said sale was only three years prior to the suit and the suit was admittedly brought within twelve years period from the said sale. Even DW1 in his cross examination deposed that he does not know whether the plaintiffs have got a right to a share in the property of their father after his death. Therefore, it indicates that he had no occasion to deny the right or title of the plaintiffs.

20.8 On a harmonious consideration of the entire evidence, it is not possible to come to a safe conclusion that the plaintiffs are out of joint possession and that the exclusive possession of the 1st defendant is hostile to the plaintiffs' right, title and interest in the joint properties left behind by late Venkatappa. On such scrutiny of the evidence brought on record, this Court finds that the contention of the 1st defendant that he perfected title by means of adverse possession coupled with ouster in respect of the plaint schedule properties in respect of

which a preliminary decree has been granted by the trial court cannot be countenanced. Point no.3 is accordingly answered against the appellants.

20.9 POINT No.4:

As a sequel to the findings of this Court on points 1 to 3 supra, it is to be held that the contention of the appellants that the decree and judgment of the trial court are unsustainable under facts and in law is without merit and is liable for rejection. The said contention is accordingly rejected.

21 POINT No.5:

On the above analysis and for the findings recorded on the points supra, this Court finds that the appeal suit, which is devoid of merit, is liable for dismissal.

In the result, the appeal suit is dismissed. No costs.

Miscellaneous petitions pending, if any, shall stand closed.

M. SEETHARAMA MURTI, J

19.02.2018
Va/Vjl